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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-148

ROGER A. BRITT, et al.,

Petitioners,

v.

SAN DIEGO UNIFIED PORT DISTRICT and
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF SAN DIEGO,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

CITATIONS

Page

CASES

CITATIONS (Continued)

Page

CASES (Continued)

CITATIONS (Continued)

Page

CASES (Continued)

STATUTES and REGULATIONS

CITATIONS (Continued)

CITATIONS (Continued)

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JURISDICTION

The Petition for Writ of Certiorari (*Petition*) does not present an issue as to which this Court should exercise its jurisdiction at the present time. As Respondent San Diego Unified Port District (hereinafter "Port District") will discuss *infra*, this Court should not exercise its jurisdiction to consider an interlocutory decision which derives from a proceeding primarily eminent domain in nature where additional proceedings below will require this Court's review of other federal questions at a later date.

QUESTIONS PRESENTED

1. Whether the Court of Appeal correctly ruled that the regulation of aircraft *in flight* for noise abatement purposes is federally preempted, and that the Port District is therefore not liable under state law for harm alleged to arise from the operation of jet aircraft in navigable airspace.

2. Whether this Court should grant a Petition for Writ of Certiorari where no conflict of decisions exists between a court of last resort of a state and one or more United States Courts of Appeals or this Court; or between courts of last resort of two or more states.

3. Whether this Court should grant a Petition for Writ of Certiorari when: (1) The decision below is interlocutory in nature and derives from a proceeding essentially eminent domain in nature; and (2) the underlying actions will require consideration by this Court of other federal questions at a later time.[1/]

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

The San Diego Unified Port District ("Port District") is a special district created by the California Legislature in 1963 (San Diego

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1/ Petitioners ask this Court to consider whether tort actions predicated upon airport noise may be brought against the United States of America in Federal District Courts (*Petition* at 3-4). That question has not been briefed, raised or argued below and appears nowhere in the record. Accordingly, this Court should not consider it. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Lawn v. United States*, 355 U.S. 339, 362-363 n.16 (1958); *Husty v. United States*, 282 U.S. 694, 701-702 (1931); *Duignan v. United States*, 274 U.S. 195, 200 (1927); *Tyrrell v. District of Columbia*, 243 U.S. 1, 4 (1916). Furthermore, this Court does not render advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

Unified Port District Act, Stats.1962, 1st Ex.Sess., c. 67, California Harbors & Navigation Code, Appendix 1, §§1 *et seq.* [West Supp. 1977]) to administer state owned tidelands which previously had been controlled by five local municipalities in the San Diego region. San Diego International Airport - Lindbergh Field ("Lindbergh Field"), San Diego's major commercial air carrier airport, is located on state owned tidelands. Administration of the airport passed to the Port District upon its creation in 1963.

Petitioners here, and plaintiffs in the underlying actions, are residents (and one church) of San Diego, living in an area in proximity to Lindbergh Field. Petitioners have contended that their properties have been taken and damaged and their persons injured as a proximate result of noise and other effects generated by jet aircraft operations at Lindbergh Field.

II. PROCEEDINGS BELOW.

In July, 1975, petitioners filed an action entitled *Britt, et al. v. San Diego Unified Port District*, San Diego Superior Court No. 367963. Later, a similar action, *Banks, et al. v. San Diego Unified Port District*, San Diego Superior Court No. 379755 was filed, and the two actions were consolidated. Originally, 936 individuals and one church were named as plaintiffs. The sole named defendant was the Port District.

In Count 1 of their complaints, petitioners alleged that their property had been taken by the Port District in derogation of their rights under the Just Compensation Clause of the Fifth Amendment to the Constitution of the United States (as incorporated through the Due Process Clause of the Fourteenth Amendment), and Article I, §19 of the California Constitution. Counts 13 and 14 of petitioners' complaints alleged that the Port District was liable to them as third party beneficiaries under contractual agreements between the Port District and the Federal Aviation Administration (FAA) which are commonly known as "grant agreements". Neither the inverse

condemnation count nor the grant agreement counts are at issue here. Both the inverse condemnation and grant agreement theories raise substantial federal questions.

The Port District, however, demurred to the other counts of petitioners' complaints, which sound respectively in nuisance (Counts 3 and 4); negligence (Counts 5 and 6); trespass (Counts 7 and 8); and failure of the Port District to obtain a proper operating permit from the State of California, Department of Transportation, Division of Aeronautics (Counts 9 and 10). The ground of the demurrers was that these actions, based upon California statute,[2/] are not permissible because the field of airport noise regulation has been preempted by the federal government (*City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973)); and that the award of damages by a court is as much a regulation of preempted activity as any injunctive relief or legislative action. *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236 (1959).

The Superior Court of the State of California for the County of San Diego overruled the demurrers, and the Port District petitioned the California Court of Appeal, Fourth Appellate District, for its writ to compel the Superior Court to sustain the demurrers. The Court of Appeal ultimately refused to issue its writ in an opinion reported as *San Diego Unified Port Dist. v. Superior Court* (1977) 67 Cal. App.3d 361. The writ was denied because the Court concluded that the tort counts of petitioners' complaints were sufficiently broad to include allegations of tortious conduct by the Port District in respect

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2/ In California, a public entity is liable only as provided by statute and may not be sued on purely "common law" theories of recovery. California Government Code §815; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 932.

of management and maintenance of ground facilities at Lindbergh Field. The court, however, instructed the Superior Court that on the trial of the action, it was not to award damages against the Port District on any tort theory of recovery for any harm caused by aircraft in flight because regulation in that field is federally preempted.

Review by the California Supreme Court was denied, and the Petition for Writ of Certiorari to this Court followed.

REASONS FOR DENYING WRIT

I. INTRODUCTION AND SUMMARY.

In holding that the Superior Court of the State of California may not, through the medium of damage awards, regulate the operation of aircraft in flight for noise abatement purposes, the California District Court of Appeal correctly followed the decisions of this Court in *City of Burbank v. Lockheed Air Terminal, Inc., supra; San Diego Bldg. Trades Council v. Garmon, supra;* as well as the decisions in *Luedtke v. County of Milwaukee,* 521 F.2d 387 (7th Cir. 1975), *aff'g in part* and *rev'g in part on other grounds,* 371 F.Supp. 1040 (E.D. Wis. 1974) and *Air Transport Association of America v. Crotti,* 389 F.Supp. 58 (N.D. Cal. 1975). In *Burbank,* this Court held that the preemptive scope of the Federal Aviation Act of 1958 (49 U.S.C. §§1301 *et seq.*, as amended) evidenced an intent by Congress to establish a uniform and exclusive scheme of federal regulation of aircraft in flight for noise abatement purposes. It was the view of this Court that the comprehensive scheme of federal regulation of aircraft and airport noise left "no room for local curfews or other local controls." 411 U.S. at 638.

Petitioners argue that in footnote 14 to the *Burbank* decision, this Court exempted local proprietors of airports from this preemptive effect. Since their actions are against a proprietor, they suggest that *Burbank* is inapplicable to the proceedings in this case. The issue here,

however, is *not* the power of the Port District, in its capacity as a proprietor of an airport, to regulate for noise abatement purposes. The issue presented by the Port District in the proceedings below is whether or not the Superior Court, a local governmental agency which is not a proprietor of an airport, may regulate operation of an airport for noise abatement purposes through the medium of damage awards. The clear answer of *Burbank* and *Garmon* is that the Superior Court cannot play such a role in the formulation of the nation's airport and aircraft noise policy.

Not only is the decision of the Court of Appeal consistent with the existing federal case law concerning this issue, but it is also consistent with the views of the responsible regulatory agencies. Much of petitioners' argument is based upon FAA's recent statement of policy regarding airport noise as expressed in the *Aviation Noise Abatement Policy* (November 18, 1976) (*Noise Policy*). Petitioners quote selectively from general statements in the *Noise Policy* to suggest that FAA has rejected its preemptive authority in the field of aircraft noise control, and that the FAA policy statement authorizes their tort actions against an airport proprietor.

In fact, the views of FAA regarding the division of authority and responsibility between the federal government on the one hand, and proprietors on the other, are virtually identical to the division of authority as defined by the Court of Appeal in the opinion below. Both FAA and the Court of Appeal reaffirm the long established principle that the federal government has sole regulatory authority for controlling the operation of aircraft in flight for noise abatement purposes. The *Noise Policy* not only fails to delegate that authority to local proprietors; it makes it unequivocally clear that FAA will not share its responsibility for aircraft operational control with any state or local agency.

Finally, petitioners rely upon the "savings clause" of the Federal Aviation Act, 49 U.S.C. §1506, as authority for maintenance of their state law causes of action against the Port District. Nevertheless, in

both *Burbank* and other decisions, this Court has held that general savings clause provisions such as that contained in the Federal Aviation Act will not be interpreted in such a way as to frustrate and defeat Congressional purposes and objectives reflected in the more specific provisions of Congressional legislation. To interpret the savings clause as petitioners suggest would totally defeat the Congressional objective of a uniform and exclusive system of federal regulation of aircraft in flight. This Court previously has made it clear that such a result cannot be permitted.

II. THE CALIFORNIA DISTRICT COURT OF APPEAL CORRECTLY DECIDED THIS CASE.

A. The Issue Presented is the Power of a Non-Proprietor Local Governmental Entity to Regulate Aircraft in Flight for Noise Abatement Purposes. The Court of Appeal Correctly Decided that Local Agencies Which Are Not Proprietors Have No Such Authority.

In *City of Burbank v. Lockheed Air Terminal, Inc., supra,* this Court held that the "delicate balance" required by the Federal Aviation Act between the interdependent considerations of safety, efficiency in airspace management and aircraft noise control, mandated "a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. at 638, 639. Although recognizing that control of noise is deep-seated in the police power of the states, this Congressionally mandated uniform and exclusive system for regulating the nation's airways and aircraft resulted in the Court's conclusion that "the pervasive control vested in EPA and FAA under the 1972 [Noise Control] Act seems to us to leave no room for local curfews *or other local controls.*" 411 U.S. at 638 (emphasis added).

While *Burbank* involved a curfew ordinance adopted by the City of Burbank, it is well established that civil damage actions can result

in regulation of federally preempted activity as impermissible as a local injunction or legislative activity. Regarding a California damage action held to be preempted by federal labor legislation, this Court stated in *San Diego Bldg. Trades Council v. Garmon, supra*:

> "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutory effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme [citation omitted]. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern."
> 359 U.S. at 246-247.

This principle has often been reaffirmed. *E.g., Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286-292 (1971); *Iron Workers v. Perko*, 373 U.S. 701, 705-706 (1963); and *Plumbers' Union v. Borden*, 373 U.S. 690, 693-694 (1963).[3/]

3/ Petitioners analogize this case to the decision last term in *Farmer v. United Brotherhood of Carpenters*, 97 S.Ct. 1056 (1977), contending that *Farmer* held that the National Labor Relations Act did not preempt the right of a union member to sue a union in state court for tortious conduct. They (footnote continued on next page)

Burbank and *Garmon*, read together, make it clear that tort theories of recovery against the proprietor of an airport for harm caused by aircraft in flight would present an impermissible threat of local regulation in the federally preempted field of aircraft flight operations; and that such actions would therefore violate the Supremacy Clause of the Constitution of the United States.

(footnote continued from previous page)

claim that *Farmer* "emphasized the state's interest in protecting its citizens from tortious injury, and the concurrent lack of Federal interest in protecting tortious conduct" (*Petition* at 17-18).

The holding of *Farmer*, of course, is much more narrow. *Farmer* reaffirms the general rule in *Garmon* (97 S.Ct. at 1061) but also recognizes that there are certain exceptions to the *Garmon* rule as, for example, where the activity "'was a merely peripheral concern of the Labor Management Relations Act'." *Id.* The decision in *Farmer* was premised upon the determination that the underlying action involved "violent tortious activity" and that the federal labor statutes do not protect or immunize from state action "violence or the threat of violence in a labor dispute". *Id.* at 1063. The Court noted that the complaint in the underlying action alleged "'outrageous conduct, threats, intimidation, and words'" (*Id.* at 1064); and the Court emphasized that "[r]ecovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress." *Id.* at 1066. While concluding that Congress did not intend to preclude state actions for intentionally violent torts, the Court "reiterate[d] that concurrent state court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme." *Id.*

The underlying actions in this case do not involve torts requiring a finding of "outrageous" or "intentional" conduct. Further, *Burbank* makes it inescapably clear that adjudication of issues regarding the regulation of aircraft in flight for noise abatement purposes would present a "realistic threat of interference with the [exclusive] federal regulatory scheme."

In *Luedtke v. County of Milwaukee, supra,* a post-*Burbank* case directly on point with the issue presented here, the Seventh Circuit Court of Appeals reached that very conclusion, holding:

> "Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank, supra,* the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, §114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the 'taking' of their property, the plaintiffs have actions at law to recover just compensation from the County. *Griggs, supra;* Section III, *supra.* To the extent that the County [proprietor] may be violating the federal laws or regulations, the plaintiffs should, as explained in Section V, supra, exhaust their administrative remedies."
> 521 F.2d at 391.4/

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Petitioners seek to create the impression that the decision of the California District Court of Appeal is somehow "unique" (*Petition* at 12-13 and 31-35). Not only is that not true with respect to the cases which petitioners did cite, but they are able to attempt to create that impression only by failing to cite or otherwise advise this Court of the existence of *Luedtke. Luedtke* is directly on point, and the Port District has consistently relied upon *Luedtke* as being a correct statement of the application of *Burbank* to civil tort actions. The Court of Appeal devoted over two pages of its opinion to a discussion of *Luedtke* (67 Cal.App.3d at 369-371), and it is, we believe, revealing that petitioners find that the only way in which they can deal with *Luedtke* is to ignore the case totally.

Other federal courts dealing with airport damage actions have expressed similar views. In *Virginians for Dulles v. Volpe,* 344 F.Supp. 573 (E.D. Va. 1972), *aff'd in part* and *rev'd in part on other grounds,* 541 F.2d 442 (4th Cir. 1976), the court presaged both *Burbank* and *Luedtke* in denying plaintiffs' damage actions by stating:

> "Moreover, there are other obstacles to relief for the plaintiffs. If, as the Supreme Court has said, albeit by dicta, in Washington v. General Motors Corp. [406 U.S. 109 (1972)], and Illinois v. City of Milwaukee [406 U.S. 91 (1972)], federal regulations and laws have preempted the federal common law of nuisance so far as *emissions* from airplanes are concerned, the regulations and laws are at least as pervasive in the field of aircraft *noise.* 49 U.S.C. §1431, 14 CFR Part 36."
> 344 F.Supp. at 579.

On appeal the Fourth Circuit Court of Appeals held that the damage issue had not been properly preserved for appeal (541 F.2d at 444), but the court did note that the trial court had excluded evidence on aircraft emissions because of federal preemption of that field. *Id.* Implying that the noise issue could have been dealt with in a similar fashion, the court then stated:

> "The district court wrote before the Supreme Court decided *Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973), which deals with the federal preemption of local and state regulation of aircraft noise."
> 541 F.2d at 444 n.1.

Thus, all of the federal courts which have faced the issue of applying *Burbank* to civil tort actions have reached the same conclusion: Such actions are not permissible absent an allegation that some relevant federal statute has been violated by the defendant. If the opinion of the Court of Appeal is in any sense "unique", it is

only because the Court of Appeal, in leaving the proprietor with potential tort liability for ground activities, did not go as far as the federal courts in barring such actions.

The core of petitioners' argument is summarized at page 29 of their petition where they state that the Port District "fervently" argued to the Court of Appeal - and that the Court of Appeal accepted - that *Burbank* "held that airport operators can exert no control over jet noise." Their contention is that the Port District premises its position upon the argument that airport proprietors have *no* residual authority to regulate in this field. It is difficult to characterize that argument as anything less than an intentional misrepresentation to this Court.

The Port District has consistently taken the position that FAA is the sole regulatory authority for the operation of jet aircraft in flight. Neither the proprietor nor anyone else, we believe, can require aircraft to utilize approach or departure procedures or other flight operational procedures which are contrary to the complicated, detailed and express regulations of FAA which now govern such operations (See, *e.g.*, 14 C.F.R. Parts 71, 73, 75, 77, 91, 93, 95 and 97). The Port District has also taken the position that *Burbank* holds that local or state governmental entities who are not proprietors (including the judiciary) have no residual authority to regulate noise at the nation's airports.[5/]

5/ Obviously, with the caveat that local municipalities do retain the authority to engage in land use planning activities in areas adjacent to airports. The Port District, however, is a special district of limited jurisdiction, and it does not have jurisdiction over the zoning of residential areas in proximity to Lindbergh Field. The responsibility for the utilization of land use planning techniques as a noise abatement strategy in San Diego rests with the City of San Diego.

Nevertheless, the Port District has always recognized that this Court expressly declined to decide in *Burbank* what residual regulatory authority, if any, might remain in airport proprietors. 411 U.S. at 635-636 n.14. The Port District has also acknowledged that proprietors may, under the current state of the law, have some residual authority to regulate in this field not available to non-proprietors.

The basis for the view that the proprietor *may* have some residual regulatory authority is the decision of this Court in *Griggs v. Allegheny County*, 369 U.S. 84 (1962). Decided at the dawn of the commercial jet age in the United States, *Griggs* holds that where a private property owner complains that his property has been taken by virtue of the noise generated by jet aircraft operations at a recently constructed airport, it is the airport operator and not the federal government or the airlines who must meet the constitutional obligation of paying "just compensation" to the property owner. So long as *Griggs* remains the law in the United States, then it is reasonable to assume that proprietors may have at least some correlative authority by which they can mitigate their potential inverse condemnation liability.[6/]

But the principle that proprietors have responsibility for the acquisition of the "approaches" necessary to operate the airport is

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6/ Because of the existence of *Griggs*, the Port District did not demur to petitioners' inverse condemnation count on preemption grounds. (The opinion of the Court of Appeal is in error where it states that we did not "contest the overruling" of our demurrer to the inverse condemnation count [67 Cal.App.3d at 364]. In fact, our demurrer to that count was on other grounds and was sustained with leave to amend. The court is essentially correct, however, in that we did not present the *Griggs* issue to it and sought its writ only with respect to the tort counts of petitioners' complaints). Nevertheless, the Port District has raised preemption as a defense to the inverse condemnation count in its answer to petitioners' complaints; and the Port District contemplates establishing a record on the trial of the actions to form a basis upon which it will ultimately ask this Court to reconsider *Griggs*.

not authority for the proposition that this Court intended by *Griggs* to make proprietors responsible for the "reasonableness" or "unreasonableness" of the procedures under which aircraft in flight operate in navigable airspace.[7/] The thrust of petitioners' argument is that proprietors are exempt from *all* preemption in this field. They then expand that misconception by arguing that because the proprietor may regulate, it can be *commanded* to exercise its authority by another non-proprietor state agency - in this case the Superior Court of the State of California. In rejecting that very argument, an Illinois court recently noted in *Village of Bensenville v. City of Chicago,* 16 Ill.App.3d 773 (1973):

> "As above indicated, despite language relating to the expansion of runways and supporting facilities, the real thrust of the plaintiffs' complaint is to prohibit (by a 'Tinker to Evers to Chance' combination of a court decree upon the [proprietor] to control the airlines) aircraft from producing noise or emitting fumes (while in flight over their territorial boundaries) in excess of certain limits to be fixed by the Illinois Chancery Court."
> 16 Ill.App.3d at 735.

Thus, while a proprietor *may choose* (because of its potential *Griggs* liability) not to allow additional flights which would require it to purchase additional easements, it is clear that the proprietor cannot be *commanded* to do so by a non-proprietor state or local agency. It makes no difference whether that command takes the form of legislative direction or direction by a judicial officer using the court's power either to issue an injunction or award substantial money damages. Either course is, as this Court recognized in *Garmon,* calculated to make policy and to regulate conduct.

7/ "Navigable airspace" is a defined term under 49 U.S.C. §1301(26).

The key holding of *Burbank* concerning the authority of non-proprietors is that they "'remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'" 411 U.S. at 635. The Superior Court of the State of California is not a proprietor of an airport, and it may not command the Port District, as a proprietor, in a manner which would regulate the operation of aircraft in flight. If it were permissible for either a state or local legislative or judicial body to command a proprietor to use "proprietor's powers" (if any) to regulate the operation of aircraft at the airport, then *Burbank* would mean nothing. We do not believe that this Court intended that to be the effect of its decision. The *Burbank* ordinance was nothing more than a direction to a proprietor by the City of Burbank regarding an airport located within the city's jurisdiction to prevent jet aircraft from using the airport between the hours of 11:00 p.m. and 7:00 a.m. It was a command by a non-proprietor local agency to a proprietor seeking to regulate operations at the airport, and the ordinance was held unconstitutional. Adjudication of the tort counts of the petitioners' actions, and an award of damages under any of those theories of recovery, is similarly and inescapably a command by a non-proprietor local authority to a proprietor regulating and controlling operations at the airport; and it is similarly and inescapably unconstitutional.

If, as they state, petitioners truly find it "hard to understand" how the Court of Appeal characterized as correct the conclusion that federal preemption of this field leaves no room for local controls, including civil tort actions for money damages (*Petition* at 11), then it can only be that they have not read *Burbank,* that they have not read *Garmon,* and that they have not read *Luedtke* or the other authorities to which they casually refer throughout their petition.[8/]

8/ For example, the detailed analysis by the Court of Appeal of *Air Transport Association of America v. Crotti, supra,* (67 Cal.App.3d at 371-373)

(footnote continued on next page)

The Court of Appeal's holding is neither "erroneous" nor "self-abnegating" (*Petition* at 35). The conclusion of the Court of Appeal is not only consistent with prior decisions of the federal courts on this issue of federal constitutional law - its conclusion was compelled by those decisions.

B. The FAA's Aviation Noise Abatement Policy Supports the Conclusion Reached by the Court of Appeal. In Fact, the Views of FAA and the Court of Appeal on this Issue are Virtually Identical.

Petitioners' argument relies heavily upon a recent policy statement of the Federal Aviation Administration (FAA) entitled *Aviation Noise Abatement Policy* (November 18, 1976) (*Noise Policy*). Quoting FAA as stating that it has rejected "full and complete federal preemption of the field of aviation noise abatement" (*Petition* at 10), petitioners suggest that FAA is at odds with the Court of Appeal concerning the proper division of legal authority and responsibility between the federal government on the one hand, and state and local governments (including proprietors) on the other hand. A less superficial view of the *Noise Policy*, however, reveals that the views of FAA and the Court of Appeal regarding this division of authority and responsibility are virtually identical.

While FAA may have declined for the present to exercise "fully" and "completely" its Congresionally mandated responsibility to preempt the entire field of airport noise control, the *Noise Policy* clearly reaffirms *total* federal preemption of the regulation of aircraft

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stands in stark contrast to the contention by petitioners that the Court of Appeal "*expressly* chose to disregard" the case (*Petition* at 12). Indeed, the Court of Appeal based its conclusion primarily upon the division of authority and responsibility defined in *Crotti* (67 Cal.App.3d at 376).

in flight for noise abatement purposes. In the introduction to the *Noise Policy*, the Federal Aviation Administrator and the Secretary of Transportation recognize "the responsibility of the federal government to reduce aircraft noise at its source", while assigning to local governments and airport proprietors the duty to "acquire land and assure compatible land use in areas surrounding the airport." *Noise Policy* at 2, 3. At pages 5 and 6 of the *Noise Policy*, FAA summarizes its views regarding the respective responsibility of the various parties involved in airport noise control, and it defines the scope of federal authority as follows:

> "*The Federal Government* has the authority and responsibility to control aircraft noise by the regulation of source [aircraft] emissions, by flight operational procedures, and by management of the air traffic control system and navigable airspace in ways that minimize noise impact on residential areas, consistent with the highest standards of safety."
>
> *Noise Policy* at 5.

And, in discussing the "Legal Framework" of its policy, the FAA states: "In legal terms the federal government, through this exercise of its constitutional and statutory powers, has preempted the areas of airspace use and management, air traffic control and aviation safety." *Noise Policy* at 29. The *Noise Policy* also describes past and proposed federal action with respect to noise source (aircraft) regulation (*Noise Policy* at 35-44), together with a history and description of actions considered both by FAA and the Environmental Protection Agency (EPA) in regulating aircraft operational procedures (*Noise Policy* at 44-47).

Particular actions which FAA believes proprietors can take in respect of noise abatement are also described at pages 55 through 57 of the *Noise Policy*. Almost all of those actions deal with such matters

as land acquisition and noise abatement procedures on the ground. None authorize direct proprietor regulation of aircraft in flight.[9]/

The FAA's view that it has preemptive responsibility for controlling aviation noise at its source,[10]/ while local governments and proprietors are responsible for ground related activities such as land use planning to achieve airport-compatible land use in surrounding areas, equates precisely with the dichotomy of legal responsibility defined by the Court of Appeal. The *Noise Policy* nowhere suggests that FAA has abdicated to local proprietors the authority to regulate aircraft in flight for noise abatement purposes. Rather, the *Noise Policy* reaffirms in unqualified terms FAA's intent to retain exclusive regulatory authority in that field. Far from serving as a basis for reexamination of the decision of the Court of Appeal, the *Noise Policy* is additional authority for the conclusion that the opinion of the Court of Appeal is correct.

The *Noise Policy* does suggest that proprietors may *propose* airport use restrictions to FAA.[11]/ However, FAA continues in its view that

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9/ While the *Noise Policy* does describe actions which FAA believes can be taken by an airport proprietor, the *Noise Policy* distinguishes between those activities which the proprietor "can implement directly" (land use activities) and those which the proprietor "can propose to FAA for implementation" (regulation of aircraft in flight). *Noise Policy* at 55-57.

10/ "Controlling aircraft noise at its source" is a phrase of art used by FAA to describe regulation of jet aircraft construction and flight operations. *See, e.g.,* the discussion at pages 22, 23, and 43-47 of the *Noise Policy*.

11/ "Airport use restrictions" would include: (1) "Time" restrictions such as the curfew dealt with by this Court in *Burbank*; (2) "type" restrictions excluding certain aircraft from the airport because of their noise characteristics; or (3) a combination of time and type restrictions.

> "[w]hile the airport proprietor is best situated to judge the local noise problem and to determine how to respond to it, he is not always in the best position to judge the impact of his noise reduction proposal on the national and international air transportation systems. Because of the intricacy of those systems, use restrictions at a single airport, under certain circumstances, could cause wide-spread disruption throughout those systems."
> *Noise Policy* at 58.

Recognizing that it "has the obligation to assure that proprietor actions to meet local needs do not conflict with national and international purposes" (*Id.*), FAA requires that a proprietor considering a "use restriction" as a tactic for noise abatement submit the proposal in advance to FAA with: (1) A full description of alternative noise abatement techniques; and (2) a statement of the proprietor's reason for adoption of a use restriction rather than other noise abatement alternatives. The FAA requires prior submission so that it can "ensure that uncoordinated and unilateral restrictions at various individual airports do not work separately or in combination to create an undue burden on interstate or foreign commerce, unjustly discriminate or conflict with FAA's statutory regulatory authority" (*Noise Policy* at 59); and FAA characterizes this prior review of proposed use restrictions as "vital". *Id.* Proprietor adopted use restrictions not approved in advance will not be recognized by FAA as valid, and a proprietor adopting a use restriction without prior FAA approval may expect to be a defendant in litigation initiated by the United States. *Noise Policy* at 59-60.

The FAA thus reaffirms the conclusion in *Burbank* that evaluation of use restrictions remains "peculiarly within the competence of FAA, supplemented now by the input of EPA"; and that only further Congressional action will allow "the States or municipalities in on the planning." 411 U.S. at 640. While FAA may have now invited proprietor participation in this planning process, there is no

such invitation in the *Noise Policy* to non-proprietors such as the Superior Court of the State of California.

Nevertheless, petitioners' argument regarding use restrictions is:

> "Thus, contrary to the Court of Appeal's conclusion, the FAA believes that '. . . the reasonableness of the operation of airports . . .' (67 Cal.App.3d at 369) *is* subject to examination. How else could one determine whether discrimination is 'unjust', or interference with commerce is 'unreasonable'?"
> *Petition* at 27.

This argument implies that petitioners should be permitted to pursue their tort actions by contending that the Port District should have adopted some use restriction which would have reduced their "damage" while not unjustly discriminating against users, or imposing an unreasonable burden on interstate commerce. The further implication of the argument is that FAA approves adjudication of those questions by individual trial courts.

However, the *Noise Policy* not only fails to approve such action by individual state courts, it is clear that FAA would find such a situation intolerable. The whole purpose of FAA's insistence upon prior FAA review and approval of use restrictions is that such restrictions will affect the integrated national air transportation system, and that FAA is the only authority which can accurately evaluate the total impact of a use restriction at a particular airport. Adjudication of petitioners' actions would require an evaluation of whether or not particular use restrictions proposed by petitioners would unjustly discriminate against users or unreasonably burden interstate commerce. Such an action would necessarily require evidence on every facet of the commercial air transportation system, and it would take many months - perhaps years - to try. This lengthy trial would then result only in the views of one local court on the "reasonableness" of particular use restrictions. If one local trial

court can make such a determination, then trial courts in all 50 states may do the same. The possibility, indeed probability of conflicting and inconsistent decisions is substantial. The resulting impact on maintenance of a uniform and coordinated national air transportation system is obvious - it would no longer be possible.

It is nothing more than fantasy to suggest that FAA has ever intended that individual state courts should actively participate in adjudicating the delicate balance between airspace safety, efficiency, management and the control of aircraft noise. On announcing hearings preparatory to formulation of its *Noise Policy*, the FAA stated:

> "The question of airport noise has been the subject of extensive litigation in the context of very specific and somewhat circumscribed issues being presented to the Courts in a limited factual context. The FAA does not believe that policy in this area should be the result or product of piecemeal judicial decisions. The FAA believes its role is to develop policy in a manner which, to the maximum extent possible, eliminates potential conflicts and accomodates the varying and competing interstate and local multijurisdictional interests."
> 40 *Fed. Reg.* 28844.

Finally, those portions of the *Noise Policy* relied on by petitioners are not even relevant to the true issue before this Court. As noted earlier, the issue in this case is the power of a *non-proprietor* to regulate in the field of aircraft noise abatement. The views of FAA on the authority of non-proprietor local agencies is that "[t]he scope of their authority has been most clearly described in negative terms", and that their remaining authority in the field is limited solely to land use controls. *Noise Policy* at 31-32. Since the Superior Court of the State of California is in the class of local entities which do not own airports, the *Noise Policy* again supports the conclusion reached by the

Court of Appeal that the Superior Court has no role in the regulation of aircraft in flight for noise abatement purposes.

C. The "Savings Clause" of the Federal Aviation Act Has Not Been and Cannot Be Interpreted in a Manner Which Would Permit Petitioners' Tort Counts.

As recently as last term, this Court reaffirmed in *Jones v. Rath Packing Co.*, 97 S.Ct. 1305 (1977), that where Congress has "'unmistakably . . . ordained'" that its enactments are to be the sole regulation of an area of commerce, state laws regulating that aspect of commerce are unconstitutional and impermissible. *Id.* at 1309. While this result may be compelled by an express Congressional command explicitly stated in the language of the statute, *Jones* recognized that the Congressional command of preemption may also be "implicitly contained in [the statute's] structure and purpose." *Id.* (Citing to *Burbank*). Under those circumstances, the issue then becomes whether or not the state's "'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.*

It was after an extensive review of the legislative history of the relevant statutes that this Court concluded in *Burbank* that the federal government had preempted the field of airport noise control. 411 U.S. at 633. The Congressional goals and objectives identified in that process included the need for a centralized federal authority to maintain the "delicate balance" between airspace safety and efficiency, protection of persons on the ground, as well as the control of noise pollution. *Id.* at 638-639. The Court reaffirmed that local governmental entities cannot regulate in this area so long as the Congress requires federally directed uniformity. Quoting part of the legislative history of relevant amendments to the Federal Aviation Act, the Court noted:

> "'The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves *controlling the flight of aircraft*. . . . HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.'"
> 411 U.S. at 635 (emphasis added).

Petitioners seek to escape the inevitable conclusion that their tort counts may not serve as the basis for local regulation of aircraft in flight by contending that, while the Superior Court may not be permitted to regulate the operation of aircraft in flight, it is permitted to regulate the consequences of such operations. In so arguing, they rely upon the "savings clause" of the Federal Aviation Act (49 U.S.C. §1506).[12/]

12/ Petitioners also briefly mention provisions of the Airport and Airway Development Act of 1970 (49 U.S.C. §§1701-1742) as support for their private damage actions (*Petition* at 16). Provisions of the Airport and Airway Development Act are the basis for the "grant agreement" counts of petitioners' complaints in the underlying actions (Counts 13 and 14). While not conceding the validity of those causes of action, the Port District has never demurred to them, and they have never been part of the record in the courts below with respect to the preemption issue now presented to this Court. Regardless of the merits of their grant agreement theories, there is nothing in the Airport and Airway Development Act which even remotely authorizes petitioners' tort counts.

Petitioners also mention the Clean Air Amendments of 1970, 42 U.S.C. §§1857 *et seq.* They note that §1857h-2(e) permits exercise of any rights under statute or common law "to seek enforcement of any emission

(footnote continued on next page)

One commentator, analyzing savings clause arguments on federal preemption questions, has characterized them as "makeweight arguments" and has suggested that "neither the presence nor the absence of a savings or exclusiveness provision is alone sufficient to resolve a pre-emption question." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction,* 12 Stan.L.Rev. 208, 214-215 (1959). Savings clauses are always interpreted in the context of the more specific provisions of the related legislation.

In *Texas & Pacific R. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426 (1907), this Court held that the Congressional purpose underlying the Interstate Commerce Act was to eliminate discrimination by creating uniform shipping rates to be regulated by the Interstate Commerce Commission. 204 U.S. at 439. Given that purpose, the Court held that a savings clause in the Act identical to that present in the Federal Aviation Act would not permit a private damage action attacking the reasonableness of rates which were subject to the jurisdiction of the federal agency (204 U.S. at 446-447) because, the Court concluded, "the act cannot be held to destroy itself." *Id.* at 446.

The courts have applied the reasoning of *Abilene* to other private damage actions relying upon the presence of a savings clause. In *Danna v. Air France,* 334 F.Supp. 52 (S.D.N.Y. 1971), *aff'd,* 463 F.2d 407 (2d Cir. 1972), members of a purported class charged that numerous airlines maintained a "Youth Fare" ticket pricing structure which

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(footnote continued from previous page)

standard or limitation or to seek any other relief. . ." Nevertheless, this Court has already determined the Clean Air Amendments to be preemptive in scope (*Washington v. General Motors Corp.,* 406 U.S. 109, 114-115 (1972); *See also, Virginians for Dulles v. Volpe, supra,* 344 F.Supp. at 579). In any case, petitioners have never alleged in any count of the underlying actions that the Port District has violated any regulatory "emission standard or limitation" in the operation of Lindbergh Field.

discriminated against persons older than twenty-five years in violation of Section 404(b) of the Federal Aviation Act (49 U.S.C. §1374(b)). The court held that the issue of discriminatory rates was not a proper subject for judicial inquiry and dismissed the action under the doctrine of primary jurisdiction (of the Civil Aeronautics Board).[13/] Examining the very "savings clause" upon which petitioners rely, the court concluded:

> "It is not likely that the Congress would legislate a scheme under Federal agency aegis, aiming at uniformity, and at the same time permit the survival of State common law rights inconsistent therewith. That was the holding in Texas & Pac. Ry. v. Abilene Cotton Oil Co., *supra,* where it was determined that a shipper could not sue a railroad carrier for an allegedly unreasonable charge based on filed tariffs, *because the common law right was extinguished,* as

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13/ Petitioners suggest that a similar case, *Nader v. Allegheny Airlines, Inc.,* 426 U.S. 290 (1976) authorized "common law actions in areas subject to exclusive federal (CAB) regulation." *Petition* at 17. *Nader* was basically a primary jurisdiction case. Its holding regarding the savings clause was premised upon the fact that the CAB had not, to that point, regulated in the area of airline "over-booking" (426 U.S. at 297 n.8), and that the particular language of Section 411 of the Act did not carry with it the "power to immunize". 426 U.S. at 301. Under those circumstances, the Court determined that a private damage action for overbooking would not require the trial court to "substitute its judgment" for that of the CAB. 426 U.S. at 299-300.

Nader is, therefore, readily distinguishable from the circumstances here since: (1) The FAA has adopted extensive regulations regarding aircraft in flight - including regulations adopted for noise abatement purposes; and, therefore, (2) petitioners' tort counts would require the trial court in this case to "substitute its judgment" for that of FAA regarding the regulation of aircraft in flight for noise abatement purposes.

> absolutely inconsistent with the scheme of the Interstate Commerce Act. It should be noted that the 'saving' provision in the ICA as it then stood was virtually *in haec verba* the language later adopted by the Congress in the 'saving clause' of the Federal Aviation Act of 1958. *It is clear, therefore, that the Act of 1958 had engrafted on to it, at least presumptively, the gloss of* Abilene *with which the Congress was familiar.*"
> 334 F.Supp. at 59 (emphasis added).

See also *T.I.M.E. Inc. v. United States,* 359 U.S. 464, 474 (1959) (this Court will not assume that the Congress was unaware of *Abilene, supra,* in drafting a similar "savings clause").

Further, this Court, the District Court (*Lockheed Air Terminal, Inc. v. City of Burbank,* 318 F.Supp. 914 (C.D. Cal. 1970)) and the Ninth Circuit Court of Appeals all agreed in *Burbank* that there had been a Congressional intent, as in *Abilene,* to impose a *uniform* scheme of federal regulation. Each court also concluded that the savings clause of the Federal Aviation Act could not be interpreted in a way which would frustrate the otherwise expressly stated Congressional objectives and goals in the Federal Aviation Act and related airport noise legislation. In its opinion in *Lockheed Air Terminal, Inc. v. City of Burbank,* 457 F.2d 667 (9th Cir. 1972), the United States Court of Appeals for the Ninth Circuit stated:

> "The State also points out that the Federal Aviation Act contains a 'saving clause,' 49 U.S.C. §1506, a reservation of common law and statutory remedies, indicating that Congress did not intend to preempt state and local regulatory authority.
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> 'Of course such a general provision does not resolve specific problems, Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, 671, n. 22 [83 S.Ct. 984, 991, 10 L.Ed.2d 52], but its inclusion in the

> statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable.' Head v. New Mexico Board of Examiners, 374 U.S. 424, 444, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (concurring opinion).
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> "In this case, we have found the conclusion of federal preemption 'unavoidable.' Furthermore, the Federal Aviation Act also contains language of exclusivity. 49 U.S.C. §1508 declares that the United States possesses and exercises 'complete and exclusive national sovereignty in the airspace of the United States. . . .' That is the same type of expression which the Supreme Court found in the Federal Tobacco Inspection Act to evidence Congressional intent to establish a wholly federal system which States were powerless even to supplement. Campbell v. Hussey, 368 U.S. 297, 82 S.Ct. 327, 7 L.Ed.2d 299 (1961)."
> 457 F.2d at 675.

In this Court's opinion in *Burbank,* it was the exclusivity language of 49 U.S.C. §1508 which was found to be of paramount importance. 411 U.S. at 626-627.

The true thrust of petitioners' argument in this regard is summarized at page 17 of their petition where they state: "Thus, assuming *arguendo* that Congress had an intent that local *regulation* be 'pre-empted', private *actions for damages are permitted* for any adverse consequences of the regulated activity." (Petitioners' emphasis). The inherent sophistry of this argument was recognized long ago in the often quoted opinion by Judge Dooling in *American Airlines, Inc. v. Town of Hempstead,* 272 F.Supp. 226 (E.D.N.Y. 1967), *aff'd,* 398 F.2d 369 (2d Cir. 1968), *cert. denied,* 393 U.S. 1017. In that case, Judge Dooling noted:

> "Local initiative in noise control of aviation is inherently an effort to regulate a consequence while disclaiming regulation of the cause. It cannot coexist with a comprehensive system of federal regulation of aircraft manufacture (through certificates of airworthiness) and federal regulation of air navigation and air traffic [citations omitted]."
> 272 F.Supp. at 235.

Regulation of the "consequence" *is* regulation of the cause. If individual state courts are permitted to place the intricate system of federal regulation of aviation under local control by adjudicating the "reasonableness" of aircraft flight operations, and then to place their policy determinations into effect through the award of money damages, the Congressional objective of a uniform and exclusive system of federal control of aircraft for noise abatement purposes will not only be frustrated, it will be defeated. The savings clause of the Federal Aviation Act cannot be applied in a way which would preclude accomplishment of the Congressional objective of a uniform federal solution to the national airport noise problem.

III. THE PETITION SHOULD BE DENIED BECAUSE REVIEW IS UNWARRANTED AND UNTIMELY.

A. There Is No Conflict Between a Decision of the Highest Court of a State and a United States Court of Appeals or This Court Regarding a Matter of Federal Law. Nor Is There a Conflict Between the Courts of Last Resort of Two or More States.

As noted earlier, the opinion of the District Court of Appeal is consistent with the holding of the United States Court of Appeals for the Seventh Circuit in *Luedtke v. County of Milwaukee, supra.* Both *Luedtke* and the opinion of the California District Court of Appeal rely upon and are consistent with *City of Burbank v. Lockheed Air Terminal, Inc., supra.* Therefore, even assuming, *arguendo,* that this

Court should exercise its jurisdiction under 28 U.S.C. §1257(3), the petition fails to meet the considerations of Section 1(a) of Rule 19 of this Court.

Furthermore, no conflict exists between the decisions of the highest courts of two or more states concerning the federal question involved here (see, *e.g., United States v. Oregon,* 366 U.S. 643, 645 (1961)); and the holding of the Court of Appeal that federal law has preempted the regulation of aircraft in flight for noise abatement purposes is uncontradicted by the decision of the highest court of any state.

B. The Petition Should Be Denied Because It Seeks Review of an Interlocutory Decision Addressed to an Issue Which Is Not Dispositive of the Case.

Petitioners invoke the certiorari jurisdiction of this Court under 28 U.S.C. §1257(3) which restricts this Court's appellate and certiorari jurisdiction to matters involving "final judgments or decrees". The petition here does not arise from a final judgment or decree at the conclusion of all proceedings before the trial and appellate courts of California. Rather, it is a petition which stems from an interlocutory decision in the underlying litigation.

As previously stated, the Port District demurred generally to the tort counts of petitioners' complaints, and the Superior Court overruled the demurrers. An order overruling a demurrer is not appealable in California. *Harmon v. De Turk* (1917) 176 Cal. 758, 761. The Port District sought relief by way of a writ proceeding in the California District Court of Appeal, and the court refused to issue its writ. While the court held that the regulation of aircraft *in flight* for noise abatement purposes was federally preempted, it allowed the Superior Court to adjudicate the liability of the Port District, if any, for tortious conduct in respect of the management and utilization of ground facilities at Lindbergh Field.

In so doing, the intermediate appellate court issued evidentiary guidelines to the Superior Court for application at trial (67 Cal.App.3d at 377-378) and instructed the trial court that recovery for tort damages at trial "should be limited to those damages, if any, which arise out of the operation of the airport itself". *Id.* at 378. Furthermore, the court recognized that petitioners would seek recovery from the Port District in inverse condemnation. *Id.* at 377.

There are a number of federal issues which require further adjudication by the trial court, and which may require this Court's review at a later date, including:

1. A resolution of petitioners' Fifth and Fourteenth Amendment inverse condemnation claims;

2. The trial court's interpretation and application of the instructions of the Court of Appeal to the particular facts of the underlying actions;

3. The adjudication of petitioners' "grant agreement" counts, which are not involved in this petition, and which rest upon provisions of the Airport and Airway Development Act of 1970 (and associated federal regulations); and

4. The Port District has preserved (and will prosecute an appeal from an adverse inverse condemnation judgment) the right to ask this Court to reconsider its opinion in *Griggs v. Allegheny County, supra*;[14/]

Denial of the Petition for Writ of Certiorari will not preclude petitioners from raising the question they pose here when the parties return to this Court after a full trial on the merits. What petitioners really seek from this Court is its advice concerning the instructions

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14/ See, *e.g.*, Note, *Shifting Aircraft Noise Liability to the Federal Government*, 61 Va.L.Rev. 1299 (1975).

of a California Court of Appeal at an interlocutory stage of litigation still pending in the California Superior Court. This Court does not issue advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968).

Only rarely has this Court exercised its jurisdiction under 28 U.S.C. §1257(3) in situations involving writs. The relevant policy considerations appear in *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1 (1965). There, the prerequisites to a final judgment or decree were held, *inter alia*, to be "a final assertion of jurisdiction, with no further review of that issue possible in the state courts" and "a state judgment on an issue anterior to and separable from the merits, and not enmeshed in the factual controversies of the case." *Id.* at 3.

Both of these considerations appear in *Fisher v. District Court*, 424 U.S. 382 (1976). There, the Montana Supreme Court had held that the Montana trial court possessed jurisdiction over an adoption proceeding in contravention of the Northern Cheyenne Indian Tribe assertion to exclusive jurisdiction. *Id.* at 385. In *Madruga v. Superior Court*, 346 U.S. 556 (1954), the California Supreme Court had determined that a California trial court possessed admiralty jurisdiction, again with no further review possible in the state courts. *Id.* at 557. This Court held that both *Fisher* and *Madruga* were final for purposes of its review. In each case, the issue was whether the forum court had jurisdiction. In each case, the highest court of each state determined that state court jurisdiction existed, and further review of that issue was not possible in the state courts. Further review of the federal issues in this case, as well as application by the trial court of the instructions in the opinion of the Court of Appeal is not only possible, it is virtually inevitable.

Finally, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court declared: "Eminent domain proceedings are of the type that may involve an interlocutory decision as to a federal question with another federal question to be decided later." 420 U.S. at 477 n.6. The Court also reiterated the fundamental rule that where anything further remained to be determined by a state court, no matter how dissociated from the only federal issue that had been finally

adjudicated, the final judgment rule would preclude review except where "additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date". *Id.* at 477.

CONCLUSION

> "'Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.'"
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> *City of Burbank v. Lockheed Air Terminal, Inc., supra,* 411 U.S. at 633-634 (quoting *Northwest Airlines, Inc. v. Minnesota,* 332 U.S. 292, 303 (1944) (Jackson, J., concurring)).

The California District Court of Appeal correctly concluded that this pervasive, fundamental and exclusive federal control of aircraft in flight prevents petitioners from placing regulation of aircraft operations for noise abatement purposes under the control of local courts; and the Petition for Writ of Certiorari should be denied.

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